

## **9 FAM 40.68 Notes**

*(TL:VISA-558; 07-22-2003)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 40.68 N1 Background of INA 222(g)**

*(TL:VISA-558; 07-22-2003)*

Section 632 Public Law 104-208, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), amended the INA by adding a new section, INA 222(g). This section renders void the visas of nonimmigrants who remain in the United States "beyond the period of stay authorized by the Secretary of Homeland Security". Unless it is determined that "extraordinary circumstances" exist [See 9 FAM 40.68 N3.4], the applicant must apply for a new nonimmigrant visa in the country of his or her nationality. It was clearly the intent of Congress to eliminate "consulate shopping" by visa overstays by requiring these visa applicants to be adjudicated by those best situated to assess their bona fides.

### **9 FAM 40.68 N2 Application of INA 222(g)**

*(TL:VISA-558; 07-22-2003)*

INA 222(g) applies only to aliens:

- (1) Admitted on the basis of a nonimmigrant visa [see 40.68 N2.1]; and
- (2) Who remained beyond the period of authorized stay [see 40.68 N2.2.] Also, see INA 222(g) Applicability Chart for examples of when INA 222(g) would or would not apply.

#### **9 FAM 40.68 N2.1 Admission on Nonimmigrant Visa (INA 222(g)(1))**

*(TL:VISA-558; 07-22-2003)*

INA 222(g) does not apply to aliens:

- (1) Who entered the United States on the Visa Waiver Pilot Program (VWPP) (or some other type of visa waiver)
- (2) Who entered via parole;
- (3) Who entered without inspection;
- (4) Who entered through one of the 'diplomatic visa' categories [see 40.68 N3.4-3]; or

(5) Who entered through any other means, other than on the basis of a nonimmigrant visa.

## **9 FAM 40.68 N2.2 Remaining Beyond Period Authorized by the Secretary of Homeland Security**

(TL:VISA-558; 07-22-2003)

For the purposes of INA 222(g), an alien who entered the United States on a nonimmigrant visa will be considered to have overstayed his or her visa if:

(1) The alien remained in the United States beyond the specific date stated on the Form I-94, *Arrival-Departure Record*; or

(2) The Bureau of Citizenship and Immigrations Services (BCIS) or an immigration judge has formally found that the alien has violated his or her status.

### **9 FAM 40.68 N2.2-1 Aliens Admitted Until Date Certain**

(TL:VISA-558; 07-22-2003)

Aliens admitted on "B" visas and most other visa categories are granted a specified period of stay and must depart on or before the date specified on the Form I-94. An alien who departs by the date indicated on the Form I-94 would not be ineligible under INA 222(g), unless the BCIS or an immigration judge actually makes a finding of a status violation.

### **9 FAM 40.68 N2.2-2 Aliens Admitted for Duration of Stay**

(TL:VISA-558; 07-22-2003)

Although most nonimmigrants are admitted for a specified period of time, students ("F"), exchange visitors ("J"), information media representatives ("I"), and diplomats and other foreign officials ("A," "G" or "NATO") are usually admitted for "duration of status." An alien admitted for duration of status is ineligible under INA 222(g) only if:

(1) BCIS finds a status violation while adjudicating a request for an immigration benefit, or

(2) An immigration judge finds a status violation in proceedings against the alien. In determining whether INA 222(g) applies, the consular officer's assessment of whether the alien did or did not maintain lawful status is irrelevant.

### **9 FAM 40.68 N2.2-3 Aliens with Pending Change of Status or Extension of Status Applications**

(TL:VISA-558; 07-22-2003)

An alien is not ineligible under INA 222(g) even though the departure date on Form I-94, *Arrival-Departure Record*, passes, if:

(1) The alien files a timely application for extension of stay or for a change of status, and

(2) The application is subsequently approved. In addition, if an alien departs after the date on the Form I-94 passes, but before his or her application for extension or change of status has been decided by the Bureau of Citizenship and Immigrations Service (BCIS), they shall be subject to a blanket exemption from INA 222(g), if the application was filed in a "timely manner" and is "nonfrivolous" in nature. A consular officer may consider an application nonfrivolous if it is not, on its face, a groundless excuse for the applicant to remain in the United States to engage in activities incompatible with his or her status. Posts may be satisfied that an alien filed in a timely manner using evidence such as the dated receipt or canceled check from BCIS for the payment of the application fee to extend or change status together with evidence of the expiration of the alien's legal status.

### **9 FAM 40.68 N2.2-4 Aliens Granted Voluntary Departure**

(TL:VISA-558; 07-22-2003)

An alien who stays beyond the date indicated on his or her Form I-94, or an alien who is found by BCIS or an immigration judge to have violated his or her status, is subject to INA 222(g), even if the alien is simultaneously or subsequently granted voluntary departure. This remains true even though the alien would not be "unlawfully present" under INA 212(a)(9)(B) during the period granted for voluntary departure.

### **9 Fam 40.68 N3 Requirement to Obtain Future Visas in Country of Nationality INA 222(g)(2)**

(TL:VISA-558; 07-22-2003)

An alien who has overstayed the authorized period of admission may no longer use the visa with which the he or she entered the United States. To re- enter the United States the alien must obtain a new nonimmigrant visa in the country of the alien's nationality. If an alien is in possession of two valid visas, however, only the visa used by the alien to enter the United States (i.e., the visa which is the subject of the overstay finding) is void under INA 222(g).

## **9 FAM 40.68 N3.1 "Homeless" Cases**

(TL:VISA-558; 07-22-2003)

Where there is no consular office in the country of the alien's nationality, an alien subject to INA 222(g) may apply for a new visa at either:

(1) A consular office designated by the Department to accept the immigrant visa application of such alien regardless whether he or she has filed such application, [see 9 FAM 42.61 Exhibit I]; or

(2) A post in the country in which the alien has the right of permanent residence.

## **9 FAM 40.68 N3.2 Aliens with Dual Nationality**

(TL:VISA-558; 07-22-2003)

An alien who possesses more than one nationality and who has, or immediately prior to the alien's last entry into the United States had, a residence in one of the countries of the alien's nationality shall apply at a consular office in the country of such residence.

## **9 FAM 40.68 N3.3 "Stateless" Aliens**

(TL:VISA-558; 07-22-2003)

An alien determined by the consular officer to be "stateless", shall, for the purposes of INA 222(g), be considered to be a national of the country that issued the alien's travel documentation.

## **9 FAM 40.68 N3.4 Aliens benefiting from the Extraordinary Circumstances Exemption**

(TL:VISA-558; 07-22-2003)

a. An alien subject to INA 222(g) may be exempted from the requirement of applying for future nonimmigrant visas in his or her country of nationality, if the Department finds that "extraordinary circumstances" exist.

b. The Department's regulation at 22 CFR 41.101(d)(1) defines "extraordinary circumstances" as circumstances where compelling humanitarian or national interests exist or where necessary for the effective administration of the immigration laws.

c. Extraordinary circumstances shall not be found upon the basis of convenience or financial burden to the alien, the alien's relative, or the alien's employer.

### **9 FAM 40.68 N3.4-1 Physician Serving in Under-served Area**

*(TL:VISA-558; 07-22-2003)*

The Department has determined that "extraordinary circumstances" exist for an alien physician serving in an under-served area of the United States under INA 214(l) for whom an application for a waiver of the two-year foreign residence requirement and/or a petition to accord H-1B status was filed prior to the end of the alien's authorized stay and was subsequently approved, but whose authorized stay expired during the adjudication of such application(s).

### **9 FAM 40.68 N3.4-2 Alien With Residence in Third Country**

*(TL:VISA-558; 07-22-2003)*

An alien subject to INA 222(g) whose current foreign residence, as defined in 9 FAM 42.61 N1, is in a country other than the country of his or her nationality, shall be considered to be applying under "extraordinary circumstances" if he or she applies for a visa at a post in the country of his or her current residence rather than in the country of his or her nationality.

### **9 FAM 40.68 N3.4-3 Alien Applying for Diplomatic Visa**

*(TL:VISA-558; 07-22-2003)*

INA 102 limits the applicability of provisions of the INA relating to ineligibilities to certain classes of nonimmigrants. The classes include the nonimmigrant categories A-1, A-2, G-1 through G-4 and NATO-1 through NATO-6, i.e., the 'diplomatic visa' categories. Generally, applicants in these categories shall, therefore, be exempted from the reapplication provisions of INA 222(g). If, however, they are formally found by the Bureau of Citizenship and Immigration Service (BCIS) to have committed a status violation while BCIS was adjudicating a request for an immigration benefit or an immigration judge finds a status violation in proceedings against the alien, then they will be subject to INA 222(g) ("NB" while such a situation is possible, it will only occur rarely).

### **9 FAM N3.4-4 Extraordinary Circumstances Findings in Individual Cases**

*(TL:VISA-558; 07-22-2003)*

Upon the favorable recommendation of an immigration or consular officer, if the Deputy Assistant Secretary for Visa Services determines that extraordinary circumstances exist, an alien or group of aliens may be exempted from the requirements of INA 222(g). [See 9 FAM 40.68 PN2.]

## **9 FAM 40.68 N4 Annotating the Visa**

*(TL:VISA-558; 07-22-2003)*

See 9 FAM 40.68 PN1 and also 9 FAM 41.113 PN1.9

## **9 FAM 40.68 N5 Refusal and Fee Retention**

*(TL:VISA-558; 07-22-2003)*

See 9 FAM 40.68 PN4